JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

Wong Lai Yoke & Ors v Mayban Securities Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–3373 OF 2010 AND W-02–3374 OF 2010
ZAINUN ALI FCJ, ALIZATUL KHAIR AND ANANTHAM KASINATHER JJCA
23 MARCH 2012

Securities — Financial investment advisers — Duties — Breach of duties — Statutory standards of care and due diligence — Misleading and inconsistent investment advice and recommendations given by adviser — Whether there was reasonable basis for making investment recommendation — Whether statutory defence in s 40A(6) of the Securities Industry Act 1983 ('the Act') applicable — Whether transactions fell within ambit of s 88A of the Act — Whether claim for breach of common law duty of care maintainable in absence of expert evidence — Securities Industry Act 1983 ss 40A, 86, 87, 87A & 88A

Tort — Negligence — Breach of duty — Misleading and inconsistent investment advice and recommendations given by financial investment adviser — Whether there was reasonable basis for making investment recommendation — Whether claim for breach of common law duty of care maintainable in absence of expert evidence — Whether breach established

These appeals hinged upon the question of culpability of the first defendant (Mayban Investment Management Sdn Bhd) and second defendant (Mayban Securities Sdn Bhd) as financial investment advisers and stockbrokers respectively, licensed under the Securities Industry Act 1983 ('SIA'). The first, second and third plaintiffs/appellants were private individuals who operated investment accounts with the first defendant. En Amin Rafie ('Amin'), was the former Chief Executive Officer of the first defendant and its licensed investment adviser. The plaintiffs contended that they had been invited by Amin to open investment banking account with the first defendant mainly to invest in Initial Public Offering ('IPO') and Reverse Take Over ('RTO') shares. The plaintiffs had informed Amin that they were all fairly conservative investors who were not stock market speculators. Amin had assured the plaintiffs that he would in his professional judgment, personally select suitable IPO and RTO shares and would recommend them to the plaintiffs only those that have a potential for capital gains on listing on a medium and long term basis. The plaintiffs were also told by Amin that they could rely on his skills and vast experience in the financial market. Sometime in August 2003, Amin advised the plaintiffs that Idaman Unggul Bhd ('IUB') was targeted as an up

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

and coming insurance company. Amin advised the plaintiffs that IUB was a sound investment. The plaintiffs contended that Amin did not merely inform them of the availability of IUB Securities for purchase, but that they were advised, coaxed and persuaded and led by him to believe that the IUB Securities was a viable and sound capital investment in the immediate, medium and long term point of view and that they should not miss this golden chance of such an investment. The plaintiffs invested in the IUB shares. However on the day of listing of IUB shares it was re-listed at the KLSE on 20 November 2003 at the reference price of RM1. IUB shares opened at RM1.49 and closed for the day at RM1.09. The counter not only did not recover, it nose-dived further. Amin, who was supposed to call the plaintiffs on listing day to inform them of the opening price, was away in Hong Kong. The plaintiffs suffered immediate capital loss. The plaintiffs also contended that Amin failed to furnish them the abridged prospectus. A scrutiny of the abridged prospectus showed that the information contained in the abridged prospectus was diametrically different from that as advised to them by Amin. The plaintiffs sued the defendants for breach under s 40A of the SIA, the common law and under the private statutory cause of action under s 88A of the SIA for breach of ss 86, 87 and 87A of the SIA.The main issue arising for determination were whether the defendants were liable for the loss suffered by the plaintiffs under the relevant sections of the SIA and in the tort of negligence at common law. The first defendant did not bother to subpoena Amin. In his absence there was no rebuttal of the plaintiffs' testimony especially with regard to the recommendations Amin gave them. The High Court allowed the plaintiff's claim under s 40A of the SIA, but dismissed their action under s 88A of the SIA and common law claim on the basis that expert witness ought to have been called. The defendants appealed against the finding of liability under s 40A of the SIA and the plaintiffs cross-appealed against the dismissal of the common law claim.

Held, dismissing the appeals with costs:

(1) Section 40A was especially enacted to regulate the activities of investment advisers by emplacing the statutory standards of care and due diligence incumbent on them to observe when advising clients (see para 85).

(2) The statutory defence in s 40A(6) is provided in the SIA, to exonerate an adviser who has carried out his duty under s 40A(2)(a) and based on that, he makes a recommendation with respect to particular securities that is in tandem with the risk profile of an investor by going through the other two statutory directions in s 40A(2)(b) and (c) (see para 112).

(3) Amin had made specific recommendations which were misleading and which were inconsistent with the statutory content of the duty in s 40A(2). The first defendant had not given such consideration to, and conducted such investigation of, the IUB shares that it recommended as

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

be reasonable in all the circumstances and that the recommendation was not based on such consideration and investigation. Since the adviser had failed to carry out any of the factual contents under his statutory duty, he had no reasonable basis to make the recommendation under judicial consideration (see paras 118–121).

(4) The defendants did not even take the trouble to subpoena Amin to support their case. The statutory duty under s 40A cannot be discharged in an *ipse dixit fashion*, much less when a clearly unprofessional manner is displayed (see para 136).

(5) The first defendant had contravened s 40A(2) in that the first defendant had no reasonable basis for making the recommendation to purchase the IUB shares. The first defendant was therefore statutorily liable under s 40A(4) of the SIA. As a consequence thereof, the first defendant could not rely on the defence provided by s 40A(6) (see paras 150–151).

(6) The transactions between the second defendant and the plaintiffs did not fall within the ambit of s 88A of the SIA. Thus, the plaintiffs' claim in the cross-appeal against the second defendant under common law was unsustainable on the grounds that they were not induced by the second defendant's two publications ie 'Equity Focus' and 'Company Update', since they were in fact induced by Amin's advice (see para 152).

(7) The claim for breach of the common law duty of care was not maintainable in the absence of expert evidence. The plaintiffs ought to have called other investment advisers to give expert evidence in relation to what ought or ought not to have been done in the field of investment advisory services at common law. It is prudent and expedient that when negligence at common law is alleged against professionals, the court should be assisted by evidence of those involved in the same industry as to what is an acceptable and unacceptable conduct of that profession, in this case, that of an investment adviser. In this, the plaintiffs failed to do so (see paras 153–155).

(8) The principle of the law on damages is that it is to compensate. Since there was no basis for liability under s 88A and that the defendants had not breached ss 86, 87, 87A and the common law duty, an award of exemplary damages was inappropriate in the circumstances. The court instead awarded general damages (see para 177).

[Bahasa Malaysia summary

Rayuan-rayuan ini berkisarkan persoalan kebersalahan defendan pertama (Mayban Investment Management Sdn Bhd) dan defendan kedua (Mayban Securities Sdn Bhd) sebagai penasihat-penasihat pelaburan kewangan dan broker-broker saham, yang dilesenkan di bawah Akta Industri Sekuriti 1982 ('AIS'). Plaintif-plaintif/perayu-perayu pertama, kedua dan ketiga merupakan

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

individu-individu persendirian yang mengendalikan akaun-akaun pelaburan dengan defendan pertama. Encik Amin Rafie ('Amin'), adalah bekas Ketua Pegawai Eksekutif defendan pertama dan adalah penasihat pelaburan berlesennya. Plaintif-plaintif menegaskan bahawa mereka telah dipelawa oleh Amin untuk membuka akaun perbankan pelaburan dengan defendan pertama terutamanya untuk melabur dalam saham-saham Initial Public Offering ('IPO') dan Reverse Take Over ('RTO'). Plaintif-plaintif telah memberitahu Amin bahawa mereka semua adalah pelabur-pelabur konservatif yang tidak membuat spekulasi pasaran saham. Amin telah meyakinkan plaintif-plaintif bahawa dia di atas pertimbangan profesionalnya, secara peribadi memilih saham-saham IPO dan RTO dan akan mencadangkannya kepada plaintif-plaintif yang mempunyai potensi untuk memperoleh keuntungan modal atas senarai berdasarkan tempoh jangka sederhana dan panjang. Plaintif-plaintif juga diberitahu oleh Amin bahawa mereka boleh bergantung kepada kemahiran dan pengalaman luasnya dalam pasaran kewangan. Sekitar Ogos 2003, Amin telah menasihat plaintif-plaintif bahawa Idaman Unggul Bhd ('IUB') disasarkan sebagai syarikat insurans yang meningkat naik. Amin menasihatkan plaintif-plaintif bahawa IUB adalah pelaburan yang kukuh. Plaintif-plaintif berhujah bahawa Amin bukan hanya memberitahu mereka tentang kesediaan IUB Securities untuk dibeli, tetapi bahawa mereka telah dinasihatkan, dipujuk dan diyakinkan dan dipengaruhi olehnya untuk mempercayai bahawa IUB Securities adalah pelaburan modal yang baik dan kukuh dalam pandangan tempoh jangka terdekat, sederhana dan panjang dan bahawa mereka tidak patut melepaskan peluang keemasan pelaburan sedemikian. Plaintif-plaintif telah melabur dalam saham-saham IUB. Walau bagaimanapun pada hari penyenaraian saham-saham IUB ia telah disenaraikan semula di BSKL pada 20 November 2003 pada harga rujukan RM1. Saham-saham IUB dibuka pada RM1.49 dan ditutup untuk hari itu pada RM1.09. Kaunter bukan sahaja tidak pulih malah merundum jatuh. Amin, yang sepatutnya memanggil plaintif-plaintif pada hari penyenaraian itu untuk memberitahu mereka harga buka, berada di Hong Kong. Plaintif-plaintif mengalami kerugian modal serta merta. Plaintif-plaintif juga berhujah bahawa Amin telah gagal untuk memberi mereka *abridged prospectus*. Penelitian *abridged prospectus* menunjukkan bahawa maklumat yang terkandung dalam *abridged prospectus* adalah bebeza daripada apa yang dinasihatkan kepada mereka oleh Amin. Plaintif-plaintif telah menyaman defendan-defendan kerana melanggar s 40A AIS, *common law* dan di bawah kausa tindakan statutori di bawah s 88A AIS kepada pelanggaran ss 86, 87 dan 87A AIS. Isu utama yang timbul untuk ditentukan adalah sama ada defendan-defendan bertanggungjawab untuk kerugian yang dialami oleh plaintif-plaintif di bawah seksyen-seksyen berkaitan AIS dan dalam tort kecuaian dalam *common law*. Defendan pertama tidak peduli untuk memberi subpoena kepada Amin. Dalam ketiadaannya tiada pematahan testimoni plaintif-plaintif terutamanya berhubung syor-syor Amin yang diberikan kepada mereka. Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif di bawah s 40A AIS, tetapi menolak

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

tindakan mereka di bawah s 88A AIS dan tuntutan *common law* berasaskan bahawa saksi pakar patut dipanggil. Defendan-defendan telah merayu terhadap penemuan liabiliti di bawah s 40A AIS dan plaintif-plaintif telah membuat rayuan balas terhadap penolakan tuntutan *common law* itu.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Seksyen 40A telah digubal khususnya untuk mengawal aktiviti-aktiviti penasihat-penasihat pelaburan dengan meletakkan piawai berjaga-jaga dan usaha wajar statutori yang diwajibkan ke atas mereka untuk dipatuhi apabila menasihat pelanggan-pelanggan (lihat perenggan 85).

(2) Pembelaan statutori dalam s 40A(6) diperuntukkan dalam AIS, untuk melepaskan penasihat yang menjalankan kewajipannya di bawah s 40A(2)(a) dan berdasarkan itu, dia membuat syor berkaitan sekuriti tertentu yang seiring dengan profil risiko seorang pelabur dengan melalui dua arahan statutori dalam s 40A(2)(b) dan (c) (lihat perenggan 112).

(3) Amin telah membuat syor spesifik yang tidak tepat dan tidak konsisten dengan kandungan statutori kewajipan dalam s 40A(2). Defendan pertama tidak diberikan pertimbangan untuk, dan melakukan siasatan tentang, saham-saham IUB yang disyorkannya adalah munasabah dalam semua keadaan dan bahawa syor itu bukan berdasarkan pertimbangan dan siasatan. Oleh kerana penasihat telah gagal melaksanakan mana-mana kandungan faktual di bawah kewajipan statutorinya, dia tidak mempunyai asas munasabah untuk membuat syor di bawah pertimbangan kehakiman (lihat perenggan 118–121).

(4) Defendan-defendan langsung tidak peduli untuk memberi sepina kepada Amin untuk menyokong kes mereka. Kewajipan statutori di bawah s 40A tidak boleh dilepaskan secara *ipse dixit*, lebih-lebih lagi apabila sikap tidak profesional jelas ditunjukkan (lihat perenggan 136).

(5) Defendan pertama telah melanggar s 40A(2) di mana defendan pertama tiada asas munasabah untuk membuat syor bagi belian saham-saham IUB itu. Defendan pertama oleh itu adalah bertanggungjawab secara statutori di bawah s 40A(4) AIS. Akibat daripada itu, defendan pertama tidak boleh bergantung kepada pembelaan yang diperuntukkan oleh s 40A(6) (lihat perenggan 150–151).

(6) Transaksi-transaksi antara defendan kedua dan plaintif-plaintif tidak terangkum di bawah skop s 88A AIS. Oleh itu tuntutan plaintif-plaintif dalam rayuan balas terhadap defendan kedua di bawah *common law* tidak boleh kekal atas alasan bahawa mereka tidak dipengaruhi oleh dua penerbitan defendan kedua iaitu 'Equity Focus' and Company Update, oleh kerana mereka sebenarnya dipengaruhi oleh nasihat Amin (lihat perenggan 152).

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

(7) Tuntutan untuk pelanggaran kewajipan berjaga-jaga di bawah *common law* tidak boleh kekal dengan ketiadaan keterangan pakar. Plaintif-plaintif patut memanggil penasihat-penasihat pelaburan lain untuk memberikan keterangan pakar berkaitan apa yang patut atau tidak patut dilakukan dala bidag perkhidmatan nasihat pelaburan di bawah *common law*. Adalah bijak dan wajar bahawa apabila kecuaian *common law* didakwa terhadap para professional, mahkamah patut membantu dengan keterangan kepada mereka yang terlibat dalam industri yang sama berhubung tingkah laku yang boleh diterima dan tidak boleh diterima dalam profesion itu, dalam kes ini, sebagai penasihat pelaburan. Dalam kes ini plaintif-plaintif telah gagal berbuat demikian (lihat perenggan 153–155).

(8) Prinsip undang-undang berhubung ganti rugi sama ada untuk memberi pampasan. Oleh kerna tiada asas untuk liabiliti di bawah s 88A dan defendan-defendan tidak melanggar ss 86, 87, 87A dan kewajipan *common law*, award untuk ganti rugi teladan adalah tidak sesuai dalam keadaan berikut. Mahkamah sebaliknya memberi award ganti rugi am (lihat perenggan 177).]

Notes

For cases on breach of duty, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1069–1089.

Cases referred to

Borg & Ors v Northern Rivers Finance Ptv Ltd 7 Ors [2003] QSC 112, CA (refd)

Cassell & Co Ltd v Boome [1972] AC 1027, HL (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 2 CLJ 569, CA (refd)

Hedley Bryne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, HL (refd)

Rookes v Barnard [1964] AC 1129, HL (refd)

Stafford and Another v Conti Commodity Services Ltd [1981] 1 All ER 691, QBD (refd)

Wong Lai Yoke & Ors v Mayban Investment Management Sdn Bhd & Anor [2010] MLJU 1332 ; [2011] 8 CLJ 718, HC (refd)

Legislation referred to

Capital Market Supervision Act 2007 s 92

Companies Act 1965

Corporation Act 1989 [AU] ss 851, 852, 852(3), (4), 849

Securities Industry Act 1983 ss 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 28A, 40A, 40A(1), (2)(a)(b)(c), (4), (6), (7), 86, 87, 87A, 88A

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

Loh Siew Cheang (Brian Foong Mun Loong, Wong Mun Hoe, Yap Mong Jay, Choo Jun Lin and Andrew Fernandez with him) (Cheang & Ariff) in Civil Appeal W-02–3373 of 2010 for the appellant.

Lambert Rasa Ratnam (Sean Yeow with him) (Lee Hishamuddin Allen & Gledhill) in Civil Appeal W-02–3374 of 2010 for the appellant.

Ariff Rozhan (William Lim with him) (Zaid Ibrahim & Co) in Civil Appeal W-02–3373 of 2010 for the respondent.

Loh Siew Cheang (Brian Foong Mun Loong, Wong Mun Hoe, Yap Mong Jay, Choo Jun Lin and Andrew Fernandez with him) (Cheang & Ariff) in Civil Appeal W-02–3374 of 2010 for the respondent.

Zainun Ali FCJ (delivering judgment of the court):

[1] The appeal and cross-appeal before us hinges upon the question of culpability of the first and second defendants (as they appear in the court below) as financial investment advisers and stockbrokers respectively, licensed under the Securities Industry Act 1983 ('SIA'). In the course of determining the above issue the question of construction of the relevant provision ie s 40A came into contention for the first time. This appeal therefore marks its rite or passage.

THE PARTIES

[2] In this appeal and cross-appeal, for ease of reference we shall refer to the parties as they appear in the court below.

[3] The appellants in W0-02–3373 of 2010 will be referred to as the first, second and third plaintiffs, whilst the respondents in W-02–3373 of 2010 and W-02–3374 of 2010 ie Mayban Investment Management Sdn Bhd and Mayban Securities Sdn Bhd will be referred to as the first defendant and second defendant respectively.

[4] All the plaintiffs are private individuals who operate investment accounts with the first defendant.

[5] The first defendant is a company incorporated in Malaysia under the Companies Act 1965. It carries on business as an investment adviser or fund manager and is an adviser within the meaning of s 40A(7)(a) of the SIA.

[6] One En Amin Rafie ('Amin') who was the former chief executive officer of the first defendant was its licensed investment adviser. The plaintiffs were the first defendant's clients.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[7] The second defendant is a company incorporated in Malaysia and carries on business as stock brokers licensed under the SIA. It maintains a research unit carrying out research into viable securities for investment generating investment options and devises investment strategies for its customers. The unit also provides technical views on stocks and analyses the market.

[8] In the court below, the plaintiffs sued the first and second defendants for breach under s 40A of the SIA, (which is a codified provision dealing with market discipline and market misconduct of the investment adviser) the common law and under the private statutory cause of action under s 88A for breach of ss 86, 87 and 87A.

[9] The defence of both the defendants were in essence a denial of liability under both the SIA and common law.

[10] The learned judge in the High Court allowed the plaintiff's claim under s 40A of the SIA, but dismissed their action under s 88A for breach of ss 86, 87 and 87A of the SIA, and common law claim on the basis that the expert witness ought to have been called.

BACKGROUND

[11] The plaintiffs became acquainted with Amin on separate occasions and were introduced to him, in the course of things. Amin first became acquainted with one Chua Hock Ann, (PW3) who was the first plaintiff's husband during their golf outing.

[12] In early 2003, Chua was invited by Amin to open a private non-discretionary investment banking account with the first defendant, mainly to invest in initial public offering ('IPO') and reverse take over 'RTO') shares.

[13] The third plaintiff, who was present at the time when Amin was advising Chua on the positive aspects of opening such an account, became interested in the said stock market arrangement.

[14] This interest was conveyed by the third plaintiff to the second plaintiff. However it is the plaintiffs' case as evidenced in their witness statements that they made clear to Amin the nature of their investment objective. All the three plaintiffs had almost similar investment objectives as disclosed to the first defendant. Generally, they were all fairly conservative investors who were not stock market speculators. They were however, practical in their approach in

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

that, they were prepared to recover a portion of their invested capital in the short term should the opportunity arises and would retain the balance for medium and long term capital gains.

[15] They were also prepared to sell the whole of their holdings if they could make a profit. As the learned trial judge had observed, 'their investment objectives can be summarised as seeking profits in the short, medium and long term'.

[16] In our view it is crucial to underline the plaintiffs' investment objective as we did above. As will be unfolded later in this judgment, it is key to the appeal against them by the first and second defendant.

[17] In pitching for the plaintiffs' clientele with regards the private investment account, Amin explained to all three plaintiffs on different occasions, the following elements:

[18] That firstly this was a good time to take advantage of the favourable market sentiment then prevailing in the securities market, in that there were considerable applications for listings on the Kuala Lumpur Stock Exchange (as the Bursa was then known), particularly through initial public offerings ('IPO') and reverse takeovers ('RTO'). In their witness statements, the plaintiffs indicated that Amin said that the chances of making immediate, medium and long term capital gains were good in the current situation in respect of the IPO and the RTO shares.

[19] In their witness statements too, it was disclose that Amin held out that should the plaintiffs open a private investment account, he as their investment manager, would carry out certain functions which would include reviewing investments and making recommendations to client in respect of investment in IPO and RTO shares.

[20] Apart from the above, the plaintiffs disclosed in their written statements that Amin indicated that his duty would be to look after their investment objectives and interest and that he would diligently vet all investments before recommending them to the plaintiffs.

[21] Amin told them that as consideration for the said services, the plaintiffs are to pay him a set of fees calculated on a monthly basis on the total investment. It is the plaintiffs contention that Amin informed them that he was in a position to secure blocks of shares by way of private placements from diverse sources, which include IPO and RTO shares that are generally not available to the public but only to the private clients of the first defendant. The

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

plaintiffs said that Amin explained to them that these are limited opportunities to participate in investments as private clients of the first defendant.

[22] Amin further assured the plaintiffs that he would in his professional judgment, personally select suitable IPO and RTO shares and would recommend them to the plaintiffs only those that have a potential for capital gains on listing on a medium and long term basis. The plaintiffs were also told by Amin that they could rely on his skills and vast experience in the financial market.

[23] The plaintiffs took the position that in view of the premium which comes with private investment account which Amin had indicated, and after they were satisfied that Amin was clear about their investment objectives, financial and particular needs and after they were duly advised of the benefits of the account, the plaintiffs opened their respective accounts.

[24] Chua (PW3) opened a non-discretionary private investment banking account in his wife's name (the first plaintiff).

[25] The third plaintiff opened his account thereafter which is also a non-discretionary account. The second plaintiff followed suit, by opening a discretionary investment banking account.

[26] The opening of private investment banking account meant that each of the plaintiffs had to execute an investment management agreement ('IMA') with the first defendant.

[27] Under the said IMA, the first defendant was appointed the 'investment manager of portfolio of assets ('the Fund') from time to time ...' for the respective plaintiffs.

[28] Clause 3.2 of IMA manifested the commitment to be undertaken by the first defendant and its duly authorised officers. They include the following:

(a) execute transaction for the Investment Account subject to the provision contained herein and the Investment Guidelines set out in the Second Schedule; and

(b) place orders for the execution of transactions for the Investment Account with or through any broker, dealer, bank or other financial institutions ('an Executive Agent') selected at the discretion of Mayban Investment, so long as the transactions are effected in accordance with the rulers, regulation and practices of ...

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[29] There are two types of accounts in the IMA. The first is a non-discretionary account and the other is a discretionary one.

[30] Under the non-discretionary account, it is provided that the first defendant can undertake the activities mentioned above only with the prior written instruction or authorisation of the first and third plaintiffs (both of them opened non-discretionary accounts).

[31] As regards the discretionary account, the first defendant and its duly authorised officers are authorised to undertake the activities mentioned, without the need for written confirmation or authorisation from the second plaintiff.

THE IDAMAN UNGGUL SHARES

[32] Sometime in August 2003, a meeting took place between Amin, Chua (the first plaintiffs husband) and the third plaintiff at the Kuala Lumpur Golf and Country Club ('KLGCC').

[33] Amin informed them that Bank Negara Malaysia ('BNM') was in the process of consolidating insurance companies in the country and the Idaman Unggul Bhd ('IUB') was targeted as an up and coming insurance company and touted to be one of the country's top notch insurance companies. They were told by Amin that IUB was undergoing a restructuring exercise for the reverse take over of Idris Hydraulic (M) Bhd ('IHMB'). At the time IHMB was a distressed PN4 company of the KLSE. Thus the exercise was achieved by means of capital reduction and reconstruction, corporate reconstruction and debt reconstruction and was effectively, a reverse takeover (RTO) of IHMB by lUB. Under the scheme, the listing status of IHMB would be taken over by lUB. Pursuant to that, Tahan Insurance (M) Bhd (formerly known as Talasco Insurance Malaysia Bhd) would become a wholly owned subsidiary of lUB. The restructuring exercise also involved the issuance of convertible loan stocks.

[34] According to the plaintiffs, Amin indicated that lUB's managing director, one Dato' Annuar Senawi is politically well-connected and that Tahan Insurance (M) Bhd was likely to be issued a Takaful license by BNM. Amin then orally recommended to both Chua and the third plaintiff to purchase lUB shares.

[35] Amin gave his advice to Chua and the third plaintiff on the advantages of the lUB Securities unequivocally. Amin further informed them that the reference price was RM1.65 and that it was a bargain as the second defendant had given lUB Securities a 'fair value of RM2.29'. Not only did Amin articulated that it was a sound investment, he went on further to say that lUB's

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

securities would be taken up by fund managers on listing, especially by foreign fund managers who were keen to take up IPO financial stocks. According to the plaintiffs in their witness statements, Amin went on to say that there was intention on the part of the IUB management to declare dividends by 2003 and that, the forecasted net profits was approximately RM40m, which Amin told the plaintiffs, were achievable.

[36] The sum of it all was that, in Amin's view, which he conveyed to the plaintiffs it was a sound investment and an opportunity not to be missed.

[37] Subsequently, the plaintiffs said that Amin gave them a copy of two documents prepared by the second defendant entitled 'Equity Focus' dated 28 July 2003 and 'company update' dated 8 August 2003 to substantiate his recommendations.

[38] The second plaintiff came into the picture when the third plaintiff informed him about Amin's advice about the IUB Securities and arranged a meeting for the second plaintiff to meet Amin. In short, Amin advised each of the plaintiffs much of the same facts about the IUB Securities, on different occasions.

[39] The plaintiffs were advised that:

(a) the share price to be offered by private placement was RM1.65, which is well below its fair value of RM2.29 as highlighted in equity focus. In equity focus it was stated that the 'offer price' was RM1.65. However in company Update the term 'offer price' was replaced with term 'reference price'. The plaintiffs were assured by Amin that 'reference price' meant the same thing and that this would be the quoted price of IUB shares on listing day; and

(b) they could recoup their initial capital investment and keep the balance for medium to long term capital growth or appreciation or dispose of all the shares, for capital gains.

[40] Importantly, it was the plaintiffs' contention that Amin spent a considerable amount of time recommending this investment. He indicated that although the effect of the full conversion of the irredeemable convertible unsecured loan stocks — A ('ICULS-A') and irredeemable convertible unsecured loan stocks — B ('ICULS-B') would dilute and decrease the value of IUB to about RM1.84 per share, it was *improbable* that such dilution by conversion would happen sooner. Amin indicated that conversion is not likely until the IUB Securities *hits RM2*. (Emphasis added.)

[41] Amin said this was indicated by lUB's management to the second

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

A defendant and it was written in equity focus; that an *arrangement exists between the largest shareholder and ICULS holders that ICULS-A and ICULS-B issued by IHMB would only be converted upon maturity date* ie three and five years respectively.

B **[42]** The plaintiff's case was that Amin had indicated to them that the management of IUB had shown an intention to pay a dividend by 2003, with a minimum dividend yield of 3%.

C **[43]** The plaintiffs said that they asked Amin to tell them the difference between the 'offer price' and 'reference price', and that Amin told them that there was no difference to the said terms. The plaintiffs contended that they were told by Amin that the reference price would be the price quoted at the time of listing, which meant that Amin had advised the plaintiffs that IUB D would be quoted at RM1.65 on listing day.

[44] The plaintiffs also contended that Amin stressed that as there was a discount of RM0.05 off the price of RM1.65 (as stated in equity focus and company update), there was no time to lose and that they would have to take E advantage of the discount, since this would translate into an immediate capital gain on the day of listing. The plaintiffs said that Amin thus encouraged and urged them to subscribe to the IUB Securities quickly.

F **[45]** The plaintiffs then asked Amin about the prospectus of IUB Securities but he informed them that it was not published yet, but that they could rely on the information to be found in equity focus and company update since the second defendant was in close touch with lUB's management.

G **[46]** Persuaded by Amin's advice, the first plaintiff purchased two million IUB shares.

[47] Insofar as the third plaintiff was concerned, his contention was that he was persuaded by Amin to purchase one million IUB Securities sometime on H 9 October 2003.

[48] Subsequently Amin was enthusiastically encouraging him to make further investments quickly of the IUB Securities and that there was only a balance of about three million IUB Securities, though this time there would be I no discount on the reference price of RM1.65.

[49] The third plaintiff said that based on Amin's inducement, he bought a further two million IUB Securities at RM1.65, sometime on 20 October 2003.

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[50] The third plaintiff said that after he had agreed to take up the two million IUB Securities upon Amin's recommendation, Amin asked him to introduce any of his (third plaintiff's friend to take up the balance of one million IUB Securities.

[51] That was when the third plaintiff introduced the second plaintiff to meet up with Amin.

[52] The same procedure or modus operandi was worked upon the second plaintiff by Amin, who then bought the balance IUB shares.

[53] The purchases made by the three plaintiffs of the IUB Securities were the culmination of Amin's inducement.

[54] The plaintiffs contended that Amin did not merely inform them of the availability of IUB Securities for purchase, but that they were advised, coaxed and persuaded and led by him to believe that the IUB Securities was a viable and sound capital investment in the immediate, medium and long term point of view and that they should not miss this golden chance of such an investment. The plaintiffs' cumulative contention was that they were told by Amin to act fast, since RM1.65 per share was 'cheap' considering that the fair value of RM2.29 was reconfirmed by the second defendant as documented in company update; and that there was intention by IUB to pay dividend, that dilution was unlikely due to an alleged arrangement between the largest shareholder and the holder of ICULS-A and ICULS-B; that conversion would likely to take place only upon the IUB Securities hitting RM2.00 and that the price of IUB Securities would rise above RM2.00 and that there was a vibrant and active market for the IUB Securities.

THE LISTING OF IUB SECURITIES

[55] However on the day of listing of IUB shares it was re-listed at the KLSE on 20 November 2003 at the reference price of RM1. IUB shares opened at RM1.49 and closed for the day at RM1.09. The counter not only did not recover, it nose-dived further.

[56] Amin, who was supposed to call the plaintiffs on listing day to inform them of the opening price (which he normally did for the previous purchases of other securities), was away in Hong Kong.

[57] The plaintiffs were shocked for they were advised by Amin that the reference price was RM1.65 a share. All of them suffered immediate capital loss.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[58] Even after all these, the plaintiffs contended that Amin failed to furnish them the abridged prospectus. They managed somehow to obtain a copy of the same dated 30 October 2003 after the event, ie after the listing of the IUB Securities.

[59] A scrutiny of the abridged prospectus only confirmed the plaintiffs' worst fears. They found that the information contained in the abridged prospectus was diametrically difference from that as advised to them by Amin orally, including the contents found in equity focus and company update.

[60] The plaintiffs were particularly unhappy upon reading the abridged prospectus since the factual contents were not what Amin had told them.

[61] The point was raised by the plaintiffs that the second defendant was one of the appointed underwriters and places of IUB Securities and Amin's negligence in failing to provide them a copy of the abridge prospectus, compounded their woes, since the issue of reference price of RM1.65 could have been addressed at that point of time and steps could have been taken to mitigate their losses if the said prospectus was read by them earlier.

[62] In fact the so called profit for lUB of approximately RM40m did not come to pass. In fact for the financial year ended 2003, lUB suffered a loss of approximately RM359m and on 29 February 2008, lUB was listed as a PN17 company by Bursa Malaysia.

[63] In the final analysis it was due to the oral recommendations of Amin that the plaintiffs were persuaded into making the investment in lUB shares, assisted in no small measure by the representations contained in equity focus and company update.

[64] A detailed breakdown of the plaintiffs' purchases are as follows:

(a) the first plaintiff (through her husband) purchased 2.5m UB shares at RM1.60 on 20 October 2003 for a total sum of RM4m after having opened a non-discretionary private investment banking account;

(b) the second plaintiff purchased one million shares at RM1.65 on 15 October 2003 after establishing a discretionary private investment banking account with the first defendant, paying RM1.65m; and

(c) the third plaintiff established a non-discretionary private investment banking account and purchase one million lUB shares at RM1.60 from the first defendant on 9 October 2003 and a further two shares at RM1.65 on 20 October 2003. His total investment in IUB Securities was RM4.9m.

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

A

WERE THE DEFENDANTS LIABLE FOR THE LOSS?

[65] In view of the dismal and bearish sentiment of IUB Securities, the first plaintiff sold off 50,000 of here shares on 21 November 2003 at RM1.1000 and the balance six months later between 18 May 2004 and 18 August 2004 when the counter slid to as low as RM0.4000.

B

[66] The second plaintiff sold off all his shares between 17 May 2004 and 28 May 2004 at between RM0.3990 and RM0.4903.

C

[67] The third plaintiff sold off all his shares between 17 May 2004 and 21 May 2004 at between RM0.3990 and RM0.4903

D

[68] In other words, all the plaintiffs suffered losses in their investment. Clearly their investment objectives were not met.

[69] In the court below, the issued were narrowed down to these two questions:

E

(a) are the defendants liable for the loss suffered by the plaintiffs under the relevant sections of the SIA?

(b) are the defendant liable for the loss suffered by the plaintiffs in the tort of negligence at common law?

F

[70] The learned trial judge found that s 40A of the SIA countenanced a stringent statutory duty and that after reading the parties' submission with regard to the relevant sections of the SIA, found the first defendant's culpability under the SIA to be confined only to s 40A. The learned trial judge dismissed all the other claims.

G

[71] The learned trial judge found the first defendant liable under the s 40A claim, on the grounds that the first defendant had failed to consider and advise on the various risk factors relating to the sustainability of IUB as a going concern and that Amin had made specific representations that were misleading in relation to the reference price, conversion of the ICULS, dividends and profit forecasts.

H

I

[72] However the learned trial judge also rejected the statutory defence provided by s 40A(6) to the first defendant, on the grounds that the first defendant had not proven the defence.

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[73] The learned trial judge rejected the plaintiffs' claim against the defendants of negligence at common law on the basis that no expert evidence was called by the plaintiffs to prove that the failure (of the IUB shares) had a correlation with the negligent advice of the first defendant.

[74] The learned trial also said that the same causal link still needs to be established in an action based on breach of fiduciary duty.

[75] The learned trial judge found that since the IUB shares were subscribed by the second defendant from Hwang-DBS (as placement agent) and that the first defendant then subscribed them from the second defendant for private placement to the former's clients and the fact that the respective investment management agreement which the plaintiffs entered into was with the first defendant, it meant that both first and second defendants operated independently of each other. Thus it is discernible that civil liability for loss cannot be founded under ss 86 or 87A of the SIA as against the second defendant.

[76] The learned trial judge also found that there was a disclaimer in place. Moreover he found that the plaintiffs in effect, did not rely on the two publications of the second defendants, ie equity focus and company update when they decided to buy the IUB shares.

[77] Thus according to the trial judge, the plaintiffs had not proved the causative element of the law of negligence attributing their loss at the KLSE to the breach of duty of care of the defendants by expert evidence.

[78] To top it all, the first defendant did not even bother to subpoena Amin, the lead character in these transactions. In his absence there was no rebuttal of the plaintiffs' testimony especially with regard to the recommendations Amin gave them, inducing them to purchase the IUB shares.

[79] There is a cross appeal by the plaintiffs against the dismissal of the common law claim, as there is an appeal against the trial judge's finding of liability under s 40A of the SIA.

[80] The question before us is whether the learned trial judge was correct in his findings above.

[81] Since the appeal is essentially against the findings of facts for the purpose of liability under s 40A of the SIA, it is instructive to now look at the said s 40A. However before doing that, a short sojourn into its background will be useful.

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

STATUTORY BACKGROUND (S 40A OF THE SIA)

[82] In 1993, by Act 943, a statutory regime for investment advisers was introduced in the existing Securities Industry Act 1983 (SIA). When it was first introduced in its original form, the SIA was a lot less refined in governing the conduct of persons engaged in the capital market services industry. Over the years however, several amendments were put in place to fortify and fine-tune the system. One of the more critical sets of amendments were those in Act 943, which came into force on 7 March 1998, governing investment advisers, with codified rules. Thus a more structured regime vis a vis fund managers and financial investment advisers were in place. It is now incumbent for an investment adviser to have a license before he can practice as such. This license is renewable annually. The governing provisions are found in ss 16 to 28A of the SIA.

[83] Section 40A of the SIA was especially enacted to regulate the activities of 'investment advisers' by setting out the statutory standards of care and due diligence they must observe when advising clients, their liabilities and the statutory defences afforded them.

[84] If the *Hedley Byrne* principles are the hallmark of the common law concept of misrepresentation and negligence, s 40A introduced concepts of duty and liability that seem to suggest this but in reality is not quite the same with the common law principles established under *Hedley Byrne*. But the common law cause of action is still retained.

[85] In our view, s 40A was especially enacted to regulate the activities of investment advisers by emplacing the statutory standards of care and due diligence incumbent on them to observe when advising clients.

[86] It is also helpful to read the explanatory statement to the bill, during the passage of the amendment. It reads:

> Clause 36 seeks to introduce new sections 40A, 40B and 40C. Section 40A seeks to provide for investor protection by *requiring the recommendations given by dealers, fund managers, investment advisers and their representatives to have a reasonable basis.*
>
> Section 40B requires dealers, fund managers and investment advisers to furnish to the Commission such returns or other information as the Commission may require.
>
> Section 40C allows the Commission to prescribe or impose on licensed persons such further requirements with respect to the conduct of the financial affairs of such licensed person.(Emphasis added.)

[87] Further, under s 14 of the SIA, no person shall act as or hold himself out as an investment adviser unless he is licensed under Part IV of the SIA. A breach

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

of this section would invite a penalty of a fine not exceeding RM1m or imprisonment for and term not exceeding ten years or to both.

[88] Under the Capital Market Supervision Act 2007 (CMSA) (which replaced the SIA) the penalty is exceedingly higher — a fine not exceeding RM10m or imprisonment not exceeding ten years or to both.

[89] What is plain for all to see is this. That the foregoing strictures in s 40A demonstrate the seriousness with which the authorities take in promoting the local capital market and in upholding its integrity and promoting discipline in relation to its activities. It would also help enhance standards and set definite rules to govern market conduct and misconduct by investment advisers.

[90] This regulation is timely since prior to the introduction of s 40A. the activities of the investment advisers were barely regulated, if at all. But with this provision in place, they must be licensed and proper regulation of their activities is assured to protect investors. In a sense, the statutory duty and code of conduct imposed on these investment advisers is a *quid pro quo* for granting them a monopoly in financial investment advise and activities.

THE STATUTORY CONTENT OF SECTION 40A OF THE SIA

[91] The entire statutory provision of s 40A is replete with negative language. It reads:

> 40A
>
> (1) An adviser *shall not* make a recommendation with respect to securities or a class of securities to a person who may reasonably be expected to rely on the recommendation *without* having a reasonable basis for making the recommendation to the person.
>
> (2) For the purposes of subsection (1), an adviser *does not have a reasonable basis* for making a recommendation to a person *unless*
>
> (a) the *adviser has*, for the purposes of ascertaining the recommendation is appropriate, taken all *practicable measures* to ascertain that the information possessed and relied upon by the adviser concerning the investment objection, financial situation and particular needs of person is accurate and complete;
>
> (b) the adviser has *given such consideration* to and *conduct such investigation* of, the subject-matter of the recommendation as may be reasonable in all the circumstances; and
>
> (c) The recommendation is based on such consideration and investigation. (Emphasis added.)

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

OUR FINDINGS

[92] We essentially affirmed the decision of the learned trial judge in his interpretation of s 40A of the SIA.

[93] Looking at the scope of s 40A, we are of the view that counsel for the first defendant had misunderstood the statutory contents of s 40A.

[94] Firstly s 40A(1) is a simple and unequivocal statutory statement of an investment adviser's duty.

[95] Section 40A(2) sets out the factual content of the statement of the statutory duty in s 40A(1). There are three limbs in s 40A(2) that must be fulfilled as a matter of fact to constitute in law, the existence of 'reasonable basis' for making recommendations to a person.

[96] Secondly, under s 40A(2)(a) the statutory focus is on information in relation to the client's investment portfolio, known by the adviser to determine whether a recommendation is appropriate or not.

[97] Thirdly, the statutory focus of the requirements in ss 40A(2)(b) and (c) is on whether an investment adviser has given professional consideration and investigation into the subject matter of the recommendation.

[98] From a reading of the cause papers and submission of first defendant's counsel, it is apparent to us that counsel had disregarded the statutory content of ss 40A(2)(b) and (c), and given undue emphasis to the statutory contents of s 40A(2)(a) only. For some reason, the first defendant took the position that *because the appropriateness of the recommendation to investment objectives, financial situation and particular needs of the client (the plaintiff) is not in issue, holding the first defendant liable under* s 40A of the SIA *is therefore erroneous.* (Emphasis added.)

[99] The first defendant contended vigorously that s 40A is essentially about knowing or being conscious only of one's own clients' investment needs. The first defendant said that the appropriateness of the recommendation to invest depends upon the clients' or investors' risk profile. In other words, the first defendant is saying that what the defendants recommend is dependent upon the clients' risk profile.

[100] The question is this. In view of the evidence led, how did the first defendant reach the conclusion that the plaintiffs' investment objectives, financial situation and particular needs fit in with the IUB profile and therefore

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

appropriate and that in the circumstances, even if the plaintiffs suffer losses they should be absolved from blame since what was recommended to them was in keeping with their investment objectives, financial situation and needs?

[101] Given that all the plaintiffs gave evidence that they are conservative investors and will not take big risks in any investment, nor were they stock market gamblers or speculators and that they could not afford to lose their life savings, we are a little non-plussed by the allegation made by the first defendant that the plaintiffs are 'high risk takers'.

[102] We are of the view that in the course of trial, there has been a misapprehension of facts and law. It was the first defendant's claim that the plaintiffs were 'high net worth speculators' and 'high risk takers', in its bid to show that the controversial IUB Securities were suitable or appropriate to form the subject matter of their recommendation to the plaintiffs. After all, IUB Securities which is the recommendation in issue, was a RTO that was on its way to listing, thus it was therefore appropriate to the plaintiffs' investment objectives, financial situation and needs.

[103] Clearly, the first defendant had paid scant regard to the evidence of the plaintiffs in particular to the evidence of PW 3 in cross-examination, where he testified, inter alia, that:

> I do not take risk without first seeking information on particular stocks that I invest in ...
>
> I decided to open account with the first defendant because of its position as an investment advisor within the ranks of premier banks in Malaysia to which I believe I would receive a high level of competency and accountability...

[104] The testimony above could hardly be said to represent the profile of a high risk taker.

[105] Although the learned trial judge was correct in his findings that the plaintiffs were not 'high net worth speculators' or 'high risk takers' as alleged by the first defendant, he presumed, under the circumstances, that s 40A(2)(a) or the risk profile of the plaintiffs, was not in issue for the purposes of the defence under s 40A(6).

[106] But it is crucial to note that s 40A(2)(a) is put in issue by the first defendant in its defence and so it is very much in contention in this appeal.

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[107] However it is our view that in the absence of Amin at trial to contradict or rebut the evidence given by the plaintiffs or to cross-examine the plaintiffs on this issue, the plaintiffs' evidence therefore as regards their investment profile holds good.

[108] Moreover under s 40A(2)(a) it is imperative that the investment adviser shows that he has taken all practical measures to ascertain the 'risk profile' or as commonly referred in investment advisory services parlance, the 'risk appetite' of the client, for the purpose of ensuring that his recommendation of particular securities synchronises with the level of the ascertained risk appetite of his client.

[109] In this connection, Amin's absence at trial to contradict the plaintiffs evidence and Amin's failure to provide any witness statement meant that the first limb of the statutory duty of care in s 40A(2)(a) has not been fulfilled by the first defendant.

[110] A reading of s 40A(2) which sets out the factual content of the statement of statutory duty in s 40A(1), makes it clear that the three requirements found in (2)(a), (b), (c) are to be read conjunctively ie all the requirements therein must be satisfied.

[111] If the first factual content ie s 40A(2)(a) (statutory directions or duty to ascertain risk appetite or risk profile) as in the present appeal, is not done or carried out by the advisers, then there is virtually nothing else to be done. It is not necessary to go further to look at the other two statutory directions for the purposes of liability under s 40A(4).

[112] In fact, the first defendant's failure to ascertain its statutory duty under s 40A(2) meant that the statutory defence under s 40A(6) is denied them. This is clear from a reading of s 40A(6) where under that section, the adviser may be exonerated from liability if it is proved that the recommendation he made was appropriate having regard to the information he had about the person's investment objectives, financial situation and particular need. In this case, obviously the first defendant had failed to provide such proof.

[113] It is clear that the statutory purpose of s 40A(6) is to preclude baseless or unmeritorious claims based merely on the fact that the investor had made a loss, in situations where an adviser has duly complied with the factual element of his statutory duty as spelt out in s 40A(2).

[114] Thus the statutory defence in s 40A (6) is provided in the SIA, to exonerate an adviser who has carried out his duty under s 40A (2)(a) and based on that, he makes a recommendation with respect to particular securities that

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

is in tandem with the risk profile of an investor by going through the other two statutory directions in ss 40A(2)(b) and (c).

[115] Now what do these other statutory duties entail?

[116] As we already know the present appeal is not a situation in which the plaintiffs had failed to disclose information concerning their investment objectives, financial situation and particular needs.

[117] It is a matter of the plaintiffs' evidence of having been induced by the first defendant to purchase the IUB shares. The learned trial judge gave due consideration to documentary and oral evidence that were adduced.

[118] The learned trial judge also found that Amin had made specific recommendations which were misleading and which were inconsistent with the statutory content of the duty in s 40A(2).

[119] We agree with the findings of the learned trial judge. We also find that it matters not whether the accounts were discretionary or otherwise, for it does not absolve the first defendant of its statutory duty under ss 40A(2)(b) and (c). There is nothing to detract us from the fact that the plaintiffs relied totally on Amin's oral statement, which were fortified by the publications of equity focus and *company update*. Amin had made out the IUB Securities was indeed a worthwhile investment and investing in them was based on an *informed choice*. (Emphasis added.)

[120] But is this the position in this appeal?

[121] Whether it is an informed choice or not relates to whether the investment adviser had investigated into the subject matter of his recommendation as may be reasonable in all the circumstances.

SECTION 40A(2)(B) AND (C)

[122] Section 40A(2) sets out the statutory circumstances under which 'an adviser' does not have a reasonable basis for making a recommendation. Thus if an adviser fails to carry out any of the factual content under his statutory duty, he has no reasonable basis to make the recommendation under judicial consideration.

[123] In our view the learned trial judge had come to a correct finding when he said that the first defendant had not given such consideration to, and conducted such investigation of, the IUB shares that it recommended as be

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

reasonable in all the circumstances and that the recommendation was not based on such consideration and investigation.

[124] Reading s 40A(2) as a whole, it is clear to us that in broad schematic terms, what is contemplated can be conceptualised as the investigative and evaluative element in the investment adviser's function. In this, it is incumbent upon the investment adviser to make his professional judgment and tender his advice about the shares or stocks to his clients.

[125] Clearly, some basic ground rules are called for, where parties have to find a medium or level of communication to enable a proper investigation to be done and communicated to the investor. Options can then be identified and evaluated, and issues can be clearly articulated.

[126] At the very least, it points to what a prudent investor would want to know or take into account or would perceive as increasing or tending to increase the risk of the proposed investment, as the case may be.

[127] The regime of s 40A(2) therefore calls for a proper involvement of the adviser to investigate. This duty is not merely implicit but clearly explicit in its requirement as ss 40A(2)(b) and (c) clearly provides.

[128] This ties in with the statutory duty of the adviser to disclose anything which might diminish the risk, if any.

[129] As it were, Amin failed to turn up. We will never know whether he weights up the possible risk of the non-disclosed fact or why he deliberately chose to conceal them.

[130] But in the final analysis, the adviser, Amin in this case, had not shown whether he had investigated the risk factors that the said company undergoing a reverse takeover would have to bear at least in the immediate and medium term, before a decision is made to purchase its shares.

[131] Even if he had determined the investment objectives of the plaintiffs under sub-s 2(a) correctly, he is bound under sub-ss (2)(b) and (c) to give 'such consideration to, and conducted such investigation of, the subject matter of the recommendation (in the instant case the IUB shares) as may be reasonable in all the circumstances'; and to ensure that 'the recommendation is based on such consideration and investigation'.

[132] As it were, the first defendant and Amin in particular displayed none of the qualities of independence of judgment and conduct expected of him.

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[133] In fact the abridged prospectus contradicted everything Amin said or stated in the documentary evidence given to the plaintiffs.

[134] For it to be suggested that the abridged prospectus was not available at that time and therefore provides the defendants a defence is surely untenable.

[135] We agree with the findings of the learned trial judge that since the adviser had failed to carry out any of the factual contents under his statutory duty, he has no reasonable basis to make the recommendation under judicial consideration; moreover an adverse inference was drawn only after the learned trial judge considered the evidence before him.

[136] As pointed out by the learned trial judge, the defendants did not even take the trouble to subpoena its ex-CEO, ie Amin to support their case.

[137] We find that the statutory duty under s 40A cannot be discharged in an *ipse dixit* fashion, much less when a clearly unprofessional manner is displayed.

[138] Further, the breach of duty does not depend on whether there is a strong or weak demand for securities (ie on the vagaries of the market) but on whether the adviser had acted within the statutory directions of s 40A of the SIA.

[139] In other words, the absence of 'reasonable basis' in making a recommendation to the client in which the client suffers loss or damage as a result of either doing or refraining from doing an act flowing from such recommendation, meant that the investment adviser is bound to make good that loss or damage suffered.

[140] It was submitted by plaintiffs' counsel that s 40A is sourced from ss 851 and 852 of the Corporation Act 1989 (Australia). There is one reported Australian case on the said sections (ss 851 and 852) ie *Borg & Ors v Northern Rivers Finance Ptv Ltd 7 Ors* [2003] QSC 112. This case was referred to and cited by the learned trial judge in assisting him in interpreting our s 40A of the SIA.

[141] According to *Borg*'s case, the legislative and regulatory purpose of s 851 is to impose a duty on an adviser to make reasonable inquiry about the client's need and circumstances. That the purpose of the statutory defence in s 852(4) which is our s 40A(6), is to cater for a situation where an adviser acts upon less than accurate information given to him or possessed by him about his client, he is not liable under s 40A(4), provided he proves that he has done his due diligence under s 40A(2). If he had done so, then the defence under s 40A(6) is available to him because then, the recommendation does not become

JOBNAME: No Job Name PAGE: 26 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

inappropriate, having taken into account the information possessed by him about his client at the time he made the recommendation. A

[142] So under s 40A(6), if an adviser such as Amin, had taken into account and given consideration to and conducted investigation into the subject matter of the recommendation under s 40A(2)(b) and (c), the adviser's recommendation shall be deemed to have been made with 'reasonable basis' so long as the recommendation is 'appropriate' having regard to the information which he possessed about his client at the material time. B

[143] But in this appeal, it is not a case in which the plaintiffs failed to disclose information concerning their investment objectives, financial situation and particular needs. Rather, it is a situation where the investment adviser had breached s 40A(2)(b) and (c) in that the first defendant did not have a reasonable basis for making the recommendation as it had not given such consideration to, and conducted such investigation of, the circumstances and that the recommendation was not based as such consideration and investigation. C D

[144] As Mackenzie J, had outlined in *Borg*'s case, if four matters coincide, then s 852 of the Corporation law provides a remedy. The four matters are: E

(a) the security advice contravenes the relevant provision in relation to a security recommendation to a client;

(b) the client, in reliance on the recommendation, does or omit to do a particular act; F

(c) It was reasonable for the client to do, or omit to do, the act in reliance on the recommendation; and

(d) the client suffers loss or damage as a result of the act or omission. G

[145] *Borg*'s case stands for the proposition that if the above four matters coincide, a securities advisor (or investment adviser) is liable to pay damages in respect of the loss or damage, subject to s 852(3), in the case of ss 859 and 852(4) in the case of s 851. H

[146] However the defendants had taken the approach that since the appropriateness of the recommendation to the investment objectives, financial situation and particular needs of the client is not in issue, s 40A of the SIA does not apply to them. I

JOBNAME: No Job Name PAGE: 27 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[147] However, having regard to *Borg*'s case, it is clear that the factual contents is ss 40A(2)(a), (b) and (c) are conjunctive requirements.

[148] It is only when the investment adviser had carried out his statutory duties under all three statutory requisites of ss 40A(2)(a), (b) and (c), that the said investment adviser could have relied on the defence under s 40A(6).

[149] Thus we go again to the issue of what does s 40A(6) of the SIA mean? The entire s 40A must be construed purposively, in its entirety, in the protection of both the investor and investment adviser, whereby s 40A(2) is meant to protect the investors whilst s 40A(6) is there to protect investment advisers.

[150] At the end of the day, we agree with the findings of the learned trial judge that the first defendant had contravened s 40A(2) in that the first defendant had no reasonable basis for making the recommendation to purchase the IUB shares. The first defendant is therefore statutorily liable under s 40A(4) of the SIA.

[151] As a consequence thereof, we agree with the learned trial judge that the first defendant cannot rely on the defence provided by s 40A(6).

SECTION 88A OF THE SIA AND THE CROSS-APPEAL

[152] We agree with the learned trial judge that the transactions between the second defendant and the plaintiffs do not fall within the ambit of s 88A of the SIA. Thus the plaintiffs' claim in the cross-appeal against the second defendant under common law is unsustainable on the grounds that they were not induced by the two publications ie 'equity focus' and 'company update', since they were in fact induced by Amin's advice.

LIABILITY OF THE FIRST DEFENDANT AT COMMON LAW

[153] As regards the claim for breach of the common law duty of care, we agree with the learned trial judge that based on the facts and circumstances of this appeal, the said claim is not maintainable in the absence of expert evidence.

[154] In our broad grounds given on 8 December 2011, we dismissed the plaintiffs' cross-appeal for breach of common law duty of care against the defendants on the ground that the claim was not maintainable in the absence of expert evidence based on the facts and circumstances of the appeal.

[155] In approaching the common law claim, we wholly disregarded the statutory provisions contained in s 40A of the SIA, which now appears in s 92

JOBNAME: No Job Name PAGE: 28 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

of the CMSA. In essence the common law claim was that the first defendant as a professional investment adviser had failed to exercise reasonable care and due diligence when making recommendations in relation to the purchase of the IUB shares prior to its listing date.

[156] In this regard we are of the view that the plaintiffs ought to have called other investment advisers to give expert evidence in relation to what ought or ought not to have been done in the field of investment advisory services at common law. If this had been done, it would have enabled or assisted the learned trial judge in arriving at a fair and rational assessment of the issue at hand.

[157] It is prudent and expedient that when negligence at common law is alleged against professionals, the court should be assisted by evidence of those involved in the same industry as to what is an acceptable and unacceptable conduct of that profession, in this case, that of an investment adviser. In this, the plaintiffs have failed to do.

[158] However our decision above is not an endorsement of the approach taken by the learned trial judge that expert evidence ought to have been led for the reasons given by him, because his approach was that negligent advice was given and loss was occasioned due to the vagaries of the market, which we quote below from the reported judgment [2010] MLJU 1332; [2011] 8 CLJ 718:

> [99] ... to succeed in negligence at common law the plaintiffs would have to prove that the defendant owed them a duty of care; that there was a breach of that duty of care; and that in consequence thereof they suffered loss (*Arab-Malaysia Finance Bhd v Steven Phoa Cheng Loon & Ors* [2003] 1 MLJ 567; [2003] 1 CLJ 585).
>
> [100] In the context of the present claim, the duty of care imposed on the first defendant as an adviser would be the duty not to give negligent advice within the known investment objectives of the plaintiffs. But the mere fact that the IUB shares had failed to make a gain at the KLSE without more does not mean that the first defendant had breached its duty of care. I would accept as correct the submission of counsel for the first defendant that by reason of the unpredictable nature of the stock market, losses could not of themselves provide evidence of negligence on the part of the first defendant for they could well be due to factors outside what had been recommended.
>
> [101] I accept the view expressed by Mocatta J, *Stafford and Another v Conti Commodity Services Ltd* [1981] 1 All ER 691 at 698 with respect to the uncertainly of the commodity exchange (which applies equally to the stock exchanged), that:

JOBNAME: No Job Name PAGE: 29 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

> ... losses in the ordinary course of things do occur even if proper care is used when one is dealing with transactions on the commodities futures market.
>
> It is quite impossible to say that the losses here were on the evidence before me, cause by bad advice given by Mr Dobell in as much as so many decisions were Mr Stafford's. That Mr Dobell brought to Mr Stafford's notice various different opinions and would not hide from him any facts which he was able to obtain in relation to any of these particular commodities I am satisfied. I am also satisfied that with the best advice in the world, in such unpredictable market as this, it would require exceedingly strong evidence on the part of the defendants. Such negligence cannot, I my judgment, be established merely by relying on the doctrine of *res ipsa loquitur*, which in my judgment has no application to the facts of the case.

[102] The passage was approved by the Court of Appeal in RE: *Merril Lynch Futures Inc & York House Trading Ltd & Another, The Times 28 June 1984*, per Griffith LJ (Cumming-Bruce, Griffith LJJ concurring). I agree entirely with the learned judge, and Mr Justice Mocatta expressed the same view in *Stafford v Conti Commodity Services Ltd* [1981] 1 All ER 691 that the mere fact that a deal is unsuccessful is not of itself sufficient to raise the inference that the advice to enter into it was necessarily negligent.

[103] Merely proving that the advise was contrary to what was stated in the prospectus or as based on wrong information would not be sufficient to prove that the first defendant was negligent at common law as the loss at the stock exchange may be due to other factors not related to any advice that the first defendant may have given. As no expert (nor any other witness) was called by the plaintiffs to prove that the failure had a correlation with the negligent advice of the first defendant, the plaintiffs' claim against the first defendant on the tort of negligence is plainly unsustainable.

[104] The same consideration would apply to an action based on breach of fiduciary duty. It is trite that a professional investment adviser is in a position of trust and therefore owes his client a fiduciary duty to act in the client's best interest, but the same causal link would still have to be established.

In any event, we note that the case of *Stafford & Another v Conti Commodity Services Ltd* [1981] 1 All ER 691 are removed from the facts of the case. In that case, the plaintiff sued the defendant broker for alleged negligence advise after having lost a substantial sum of money for carrying out 46 transactions on the London Commodities Futures Market, which Mocatta J accepted, was an unpredictable and changing market. The plaintiff relied on the doctrine of *res ipsa loquitur*. At p 696 Mocatta J said:

> In other words, the plaintiff were relying on *res ipsa loquitur*.
>
> I think that counsel for the defendants was correct in submitting that this was a

JOBNAME: No Job Name PAGE: 30 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

very strange allegation to make in relation to a notoriously wayward and erratic commodities futures market.

Later at p 697, Mocatta J said:

> Counsel for the defendants submitted plainly, rightly in my judgment, that a broker cannot always be right in advice that he gives in relation to so wayward and rapidly changing an error of judgment, if there be an error of judgment, is not necessarily negligent any more than as recently been said in relation to an obstetrician in a very important case recently decided by the Court of Appeal (*White House v Jordan* [1980] 1 All ER 650) which is now on its way up to the House of Lords (See p 267 ante). Furthermore, what is stated in that case is that the hazard of childbirth are such that the fact a child eventually is brought into this world suffering from infirmities cannot by itself be relied on the basis of the maxim *res ipsa loquitur*.
>
> The Singaporean case of *OCBC Securities Pte Ltd v Yeo Siew Huan* [1998] 2 SLR applied the principle in *Stafford and Another v Conti Commodity Services Ltd*. But that case was decided in the context of an active and volatile stock market in which it was established that the defendant was engaged in large transactions over a period of time and had been actively trading on counters already quoted on the stock market under not one counters already quoted on the stock market under not one but four accounts. The losses were suffered between the period of late 1993 and early 1994 in respect of shares quoted on the Kuala Lumpur Stock Exchange (KLSE) and as appearing at p 973B of the judgment, 'the Kuala Lumpur Stock Exchange (KLSE) counters took a severe beating due to certain events and the prices of the defendant shares plunged.
>
> The defendant was unable to pay for these positions on the due dates and the plaintiff sold them off at a loss and sought to recover these losses, with interest, in this action. We should add that in the Singaporean case, the learned judge found as a fact, at para 38 of judgment (at p 982) that *the defendant had a strong gambling streak*.. (Emphasis added.)

[159] Thus in our view, the authority cited by the second defendant and illustrated in the learned trial judge's judgment above is inapplicable insofar as the facts are distinguishable from the present appeal and cross-appeal. This is because the facts in the English and Singapore cases quoted by the learned trial judge are factually different from the present appeal and are therefore not relevant nor applicable

[160] The English case of *Stafford and Another v Conti Commodity Services Ltd* , dealt with the volatile and fast moving commodities market. As could be seen, the plaintiff there was dealing with a basket of commodities and was engaged in the activity of hedging the prices of particular commodities with other commodities.

JOBNAME: No Job Name PAGE: 31 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[161] But in the present appeal, we are not dealing with an active market at the time advice was rendered. In our appeal, it was a 'dead market'. There was only one share counter that was about to be listed in the future, *not* on the commodity exchange but on the stock or share exchange. The representations in the present appeal were definite in character and recommendations were made at a time before listing. Moreover this is not a case where advice was sought nor rendered in relation to the activity of hedging (as was the situation of *Stafford*'s case).

[162] The Singaporean case of *OCBC* which followed the English decision in *Stafford*, was a case where the plaintiff had a basket of securities and he was found to be hedging particular traded securities against other traded securities on the stock exchange.

[163] It might well be that in an active and erratic market where a person (especially one who has a 'strong gambling streak') has a basket of commodities or shares to trade and hedge, and sues a broker for negligence merely because he lost money, expert evidence may have to be led in relation to those activities forming the subject matter of the action in negligence at common law.

[164] Obviously the facts in the present appeal are nowhere near those found in both the *Stafford* and *OCBC* cases.

[165] In view of the facts and the circumstances in this appeal, we dismiss the plaintiffs' cross appeal with costs for breach of common law duty of care against the second defendant on the ground as alluded to earlier.

[166] The respective losses suffered by the plaintiffs have been tabulated by the learned trial judge at paras 39–43 of his judgment. We affirmed the learned trial judge's findings of fact under s 40A(4) of the SIA. There is no appeal by the first defendant against this finding of facts.

[167] In fact we found that the learned trial judge had tabulated losses suffered by the plaintiffs at p 38 of his judgment but failed to quantify the amount to be assessed for damages. It is clear that the tabulated losses reveal the losses to be the difference between the price at which the plaintiffs bought the shares and the proceeds of sale. The proceeds of sale, in turn represent proceeds resulting from sale of the shares in stages, conducted by the different plaintiffs over different periods of time.

[168] The tabulated losses are those that have been reflected in the various contract notes for the sales of the IUB shares on the various and varying dates as are found in the exhibits tendered by the plaintiffs and marked accordingly at the trial in the court below.

JOBNAME: No Job Name PAGE: 32 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[169] It is evident that the first defendant had failed during the trial to cross-examine the plaintiffs on the losses. In addition the statement of agreed facts at paras 17–19 dated 25 October 2005 indicate the amount of loss each plaintiff suffered. With regard to the first plaintiff, her losses are quantified in 'exh P4' which had been admitted in evidence and marked as such, amounting to RM2,904,029.07.

[170] As regards the second plaintiff, the details of his sale of the IUB shares and the loss he suffered have been quantified in 'exh P5' which had been admitted and marked accordingly. The amount of loss he suffered was quantified at RM1,229,814.83.

[171] As regards the third plaintiff, the sale of the IUB shares on the different dates and the details of his losses have been quantified and admitted in evidence and marked as 'exh P6' which amounted to RM3,639,028.45.

[172] Thus in respect of the losses suffered by each of the plaintiffs, the said principal sums of RM2,904,029.07, RM1,229,814.83 and RM3,639,028.45 are to be paid to the first, second and third plaintiffs respectively.

[173] Before us, counsel for the plaintiffs, Dato Loh Siew Cheang submitted that compound or simple interest be awarded to the plaintiffs

[174] We find no basis for awarding compound interest. However we award both pre and post judgment simple interest at 8%pa to the plaintiffs as follows:

(a) the pre-judgment interest shall commence from the respective dates of payment made by each plaintiff until the date of judgment of the High Court; and

(b) The post-judgment interest shall commence from the date of judgment of the High Court till date of actual payment.

ASSESSMENT OF LOSS/DAMAGES

[175] As regards damages, counsel for the plaintiffs submitted that exemplary damages and/or general damages be awarded.

[176] In our view, the granting of exemplary damages is not appropriate in the circumstances.

JOBNAME: No Job Name PAGE: 33 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

[177] The principle of the law on damages is that it is to compensate. We are of the view that an award of exemplary damages such as that prayed for, would have to be justified. Consonant with our findings that there is no basis for liability under s 88A and that the defendants had not breached ss 86, 87, 87A and the common law duty, we find that an award of exemplary damages would be inappropriate in the circumstances.

[178] Whilst we are aware that the Court of Appeal in *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569 had held that the decisions in *Rookes v Barnard* [1964] AC 1129 and *Cassell & Co Ltd v Boome* [1972] AC 1027 which are generally said to limit exemplary damages to particular categories or causes of actions, should not be construed too literally or narrowly, we should also not be unmindful of the fact that the principle underlying the grant of exemplary damages is to punish and deter.

[179] Having heard submissions of counsel on this point (exemplary damages) and after reviewing the authorities cited, we find that even if the conduct of the first defendant as a licensed dealer was detrimental to the plaintiffs, we are not inclined to award exemplary damages, but would instead award general damages. The award of general damages would in our view, be sufficient to promote the underlying purpose of the securities' industry of inculcating discipline and exercising care and diligence on the part of professional licensed investment advisers or fund managers to protect members of the investing public.

[180] Thus for Appeal No W-02–3374 of 2010, we dismiss the appeal with costs. We dismiss the plaintiffs' cross-appeal against the second defendant. In respect of Appeal No W-02–3373 of 2010, we also dismiss it with cost.

[181] We retain the order of the learned trial judge that damages be assessed by the senior assistant registrar, wherein the said assessment is to be conducted within two weeks from the date of this judgment.

Costs W-02–3374 of 10	RM150,000 for each plaintiffs.
	Cross-appeal dismissed and costs of RM50,000 to defendants.
Costs W-02–3373 of 10	RM150,000.
Deposit W-02–3374 of 10	Refunded to the appellants.
Deposit W-02–3373 of 10	Refunded to the appellants

JOBNAME: No Job Name PAGE: 34 SESS: 1 OUTPUT: Fri Jul 25 09:37:04 2014

Appeals dismissed with costs.

Reported by Kanesh Sundrum